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CHARLES ELMORE C

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Supreme Court of the United States

OCTOBER TERM, 1929

No. 363

GEORGIA POWER COMPANY

Petitioner

vs.

CITY OF DECATUR

Respondent

REPLY BRIEF OF GEORGIA POWER COMPANY

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REPLY BRIEF OF GEORGIA POWER COMPANY

It is respectfully submitted that the brief of respondent does not answer any of the legal principles upon which the Georgia Power Company relies.

The power or authority of a municipality to make a rate contract, for a reasonable term of years, not grossly excessive, is not involved.

That this Court is bound by the decisions of the highest Courts of the State as to the power of their municipalities, is not contested or involved.

If the municipal rate contract in question is perpetual and has not expired, and cannot be ended, terminated or surrendered, that the rate therein specified is confiscatory, does not relieve the street railway company from its obligation to serve at the rate therein specified.

> Railroad Commission vs. Los Angeles Rd. Corporation, decided December 2nd, 1929, 74 L. Ed. 113.

The contention of the Georgia Power Company is that the municipal franchise or rate contract in question has been fully performed, has expired, been ended, or terminated or surrendered. It no longer creates a contractual obligation compelling perpetual operation thereunder. The question of the duration and the construction of a municipal franchise or contract is one of general law. Compelling continuous and perpetual operation at the 5 cents rate of fare specified requires continuation of service at an undisputed, discriminatory and confiscatory rate of fare.

The facts set out and stated in the answer filed by the Georgia Power Company are undisputed evidence in the case.

(See record pages 60 and 61.)

That the contract in the case at bar has been fully performed, and has been ended, terminated or surrendered, was discussed in our original brief and will not be repeated.

(See original brief pages 9-20.)

Following the principles announced in said decisions there is no longer any contractual obligations (under the municipal franchise in question) compelling further or continued street railway operation. Therefore, such continued and compelled operation at the discriminatory and confiscatory rate of fare confiscates the property of the street railway company in violation of the 14th Amendment of the Constitution of the United States.

In determining the duration of municipal franchises, or rate contracts, this Court has repeatedly held that their duration cannot be extended by implication. This rule of law is applicable to Georgia contracts for it has been enacted into the statutory law.

Georgia Code Section 3809 provides:

> "A grantee . . . . . of a franchise takes nothing by implication."

In contending that this legal principle is not applicable to the municipal franchise or rate contract in question, respondent's brief takes positions in direct conflict with the allegations upon which its suit is predicated and founded and contends that the Municipality of Decatur had no power or authority to grant a franchise, and that the rate contract in question is no more or less than a private contract.

For instance, on page 21 of respondent's brief it is stated "Towns have nothing in the nature of a franchise to give." Again, on page 49, "The City does not give any franchise at all." The contract in question is no more or less than a private contract, is argued at length in respondent's brief.

(See pages 33-39 respondent's brief.)

Such contention is in direct conflict with the allegations in the instant suit. See the following portions of the record.

Paragraph 7 of the petition, record page 65.)

(Agreed statement of fact No. 3, pages 6, 7 and 8 of the record) where the municipal franchise is set out and it is stated, "This is the line in question in this suit."

Taking the contract in question as no more or less than a private contract, the rate therein fixed is subject to change by the Georgia Public Service Commission.

Union Dry Goods Co. vs. Georgia Public Service Commission, 142 Ga. 841, 846. Affirmed by this Court in 248 U. S. 372.

Producers Transportation Company vs. Railroad Commission, 251 U. S. 228, 232.

In former litigation between the parties this Court held that the contract and line in question was a reasonable, separate and distinct classification.

Georgia Railway & Power Company vs. Town of Decatur, 262 U. S. 438.

Considering the municipal contract in question as no more or less than a private contract, it is not a perpetual one.

CONTRACT CASES RELIED UPON BY RESPONDENT

Respondent relies upon two cases.

The contract, in each of these cases shows either a joint interest in the property itself, or a joint interest in an enterprise, or a joint enterprise.

For instance, in Franklin Telephone Company vs. Harrison, 145 U. S. 459, the facts showed that Harrison & Company itself constructed and built, at its own expense, a certain telegraph wire, which it was to own absolutely for a period of ten years. After this ten year period the ownership of this line was to pass to the telegraph company. Under the contract the title to the said property passed with the express reservation "that its use by Harrison & Company after ten years 'should

be upon the same terms in all other respects as if the wire *had not been* given up.' "

(See page 470 of the 145 U. S.)

This Court held that said contract requirement "can only be met by according to appellees (Harrison & Company) . . . . the same absolute right of use they enjoyed before the wire was given up to the company," and then calls attention to other provisions of the contract which would only accord with such construction.

In Western Union Company vs. Pennsylvania, 129 Fed. Rep. 849, the Court held that the contract created a joint enterprise. (See page 865 of 129 Fed. Rep.) A joint interest of the contracting parties in the telegraph wire, the property itself and its maintenance was also shown.

The facts, in each of the cases cited in said opinion, show that the particular contract being considered, either created a joint interest in the enterprise or a joint interest in the property.

Such contracts are essentially different from service contracts, fixing a rate to be paid therefor.

The cases relied upon by respondent are distinguished by the Supreme Court of Pennsylvania in McCullough-Dalzell Crucible Co. vs. Philadelphia, 223 Pa. 343, 72 Atl. 636, holding that a company agreeing to furnish natural gas in consideration of right of way may terminate contract on proper notice.

The contract in the case at bar does not come within the class of contracts which creates a joint interest in property or a joint interest in an enterprise, or which creates an enterprise.

The Georgia Power Company is not undertaking to keep the Municipality of Decatur from exercising dominion over or from using its streets. The contract does not give the municipality a joint property right in any property of the street railroad company. Under it the Municipality of Decatur and the Georgia Power Company have entered into no joint enterprise.

Furthermore, whether the contract in question be taken as a municipal franchise or as a private contract, under the law

of the State of Georgia which limited the charter of the Collins Park & Belt Railroad Company to thirty years, the franchise or contract made with said company, and which contained no words of succession or assigns, was by its very terms limited to thirty years' duration. It follows that the rate contract of April 1, 1903, made with reference to said Collins Park & Belt Railroad Company line did not change the duration of the franchise *or contract.*

(This question is discussed in our original brief, pages 9-20.)

ISSUE AS TO PERPETUITY

Respondent's brief asserts that the question of perpetuity of the contract is not involved. (See respondent's brief pages 51-57.)

There is no merit in this contention.

An equitable suit was brought by the City of Decatur against the street railway company to enforce perpetual, never ending operation of the line in question. Its said suit was solely and entirely based upon the municipal rate contract of April 1, 1903. The petition alleged that this contract was not only a subsisting and continuing contract, but was one that had not terminated and could not be ended, terminated or surrendered.

(See paragraph 18 of the complaint, record page 70.)

(See paragraph 25 of the complaint, record page 73.)

(See paragraph 31 of the complaint, record page 71.)

(See paragraph 33 of the complaint, record pages 75 and 76.)

The prayers of the petition specifically asked that the defendant be "permanently" enjoined;

From violating the provision of the contract; from ceasing to maintain and operate the line under the contract; from abandoning the line; from in any way carrying out the notice to terminate or end the contract; that defendant be decreed

to have no right, power or authority to surrender or terminate the franchise or cease operation thereunder.

(See prayers of the petition set out on page 76 of the record.)

The prayers of the petition specifically asked that the defendant be *permanently* or perpetually restrained in each and every one of the above particulars. The judgment and decree of the court was "that defendant in said case be and is hereby *enjoined* as *prayed for* in the petition."

(See record page 61, and again on page 96, where the decree is set out.)

The decree held that the contract was perpetual and could not be surrendered or terminated.

Respondent's brief suggests that the duration of the contract be taken as the corporate life of the Georgia Railway & Electric Company and not the corporate life of the Collins Park & Belt Railroad Company. This question was argued in our original brief.

(See original brief pages 13-20.)

In addition to what was there said, the agreed statement of facts shows that the corporate life of the Georgia Railway & Electric Company and the Georgia Railway & Power Company ended and terminated when they, with other corporations, were consolidated into the Georgia Power Company.

(See agreed statement of fact No. 9, record pages 36-37.)

Railroad Co. vs. State of Georgia, 95 U. S. 359.

State vs. Atlanta R. Co., 60 Ga. 268.

Carswell vs. National Exchange Bank, 165 Ga. 351, 357.

ARGUMENT IN RESPONDENT'S BRIEF THAT THE LINE IN QUESTION SHOULD BE OPERATED BY VIRTUE OF CHARTER PROVISIONS

There are many complete answers to this contention.

(1) The present suit is not predicated upon any claimed

charter requirement, but is based exclusively and entirely upon an alleged municipal franchise or contract.

(See paragraphs 7, 12, 18, 31 and 33 of the complaint, pages 56, 57, 70, 75, 76 of the record.)

(2) The charter of the Collins Park & Belt Railroad Company has expired.

(3) The corporate existence of the Georgia Railway & Electric Company and the Georgia Railway & Power Company was terminated by their consolidation with other corporations into the Georgia Power Company.

(Agreed statement of fact No. 9, record pages 36-37.)

(4) The charters of said companies were merely permissive charters and need not be surrendered.

State of Texas vs. Eastern Texas Rd. Co., 264 U. S. 79.

(5) There are no charter obligations compelling the Company to operate the line in question.

(See page 9 of the record.)

(6) If the present suit had been based upon charter obligations (instead of upon the alleged municipal franchise or contract) the municipality could not compel continued operation at the 5 cents rate of fare. This Court has held that where a municipality is seeking to compel continued operation under charter obligations and the charter does not provide for the rate of fare, it cannot compel operation at a fare so low as to require operation at a loss.

Detroit & R. Co. vs. Detroit, 248 U. S. 429.

City of Lincoln vs. Lincoln Home Tel. Co., 279 Fed. 949 (1), 952 (1), and cases therein cited.

OTHER QUESTIONS DISCUSSED IN RESPONDENT'S BRIEF APPLY TO QUESTIONS OF STATE PRACTICE

Under our view of the law this Court is not concerned with these questions, but as they have been discussed at great

length in respondent's brief, we take the liberty of replying and showing that there is no merit in the argument.

ASSIGNMENTS OF ERROR CARRYING CASE TO THE SUPREME COURT OF THE STATE OF GEORGIA WERE SUFFICIENT

In respondent's brief pages 32-35; pages 74-84; it is argued that the assignments of error, carrying the case to the Supreme Court of the State of Georgia, are insufficient.

The case at bar was an equitable suit brought by the City of Decatur against the Georgia Power Company based upon a certain claimed municipal rate contract. In answer to said suit the Georgia Power Company contended that said municipal rate contract had been ended, terminated and surrendered by timely written notice. In the final hearing of the case the trial court passed upon both the law and the facts and rendered a decree enjoining the defendant as prayed in the petition.

The decree, as rendered, is set out on pages 61 and 96 of the record.

The assignments of error, in the Georgia Bill of Exceptions are found on page 61 of the record.

That such assignments of error are sufficient under the Georgia practice is shown by the following cases.

In the case of Atlanta Railway & Power Company vs. Atlanta Rapid Transit Company, 113 Ga. 481, it was held that an assignment of error upon an order granting or denying an injunction, as follows "to which order the plaintiff excepted and now excepts and assigns the same as error, in that it is contrary to law and evidence in the case" is a sufficient assignment of error.

In the case of Kirkland vs. Atlantic Birmingham Railway Co., 126 Ga. 246, the Court held: where a Court determines a case and passes upon both the law and the facts as "a party can not compel a Judge, in such a hearing, to pass separately on questions of law and fact. . . . . The losing party can not

well complain of specific rulings, if the Judge made none." The assignment of error in that case, to wit: "To which said judgment refusing and denying the temporary injunction prayed the said plaintiffs then and there excepted, and now except and assign the same as error, and say that the Court erred in not granting the temporary injunction as prayed by the plaintiffs in their petition", was sufficient.

It is not necessary to multiply decisions on this question. Georgia Code Section 6183 provides:

> "It shall be unlawful for the Supreme Court of Georgia to dismiss any case for any want of technical conformity to the statutes or rules regulating the practice in carrying cases to that Court, where there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided therein."

For the construction placed upon this Section by the Supreme Court of Georgia, see

Colquitt County vs. Bahnsen, 162 Ga. 340, 344, 345.

ISSUES RAISED BY PLEADINGS

Respondent's brief (pages 34 and 35) says that the answer of defendant did not raise the question sought to be reviewed.

There is no merit in such contention.

The equitable suit brought by the City of Decatur sought to compel the Georgia Power Company to perpetually operate under the alleged municipal rate franchise of April 1, 1903. The petition alleged that said contract of April 1, 1903, is a valid subsisting and binding contract upon defendant.

(See paragraph 18 of the petition, record page 70.)

The petition alleged that the defendant sought to end, terminate or surrender the contract and on the 26th day of September, 1925, after corporate action, notified petitioner that the contract was ended, terminated or surrendered and that

the street railway company would cease any further or continued operation thereunder.

(See paragraph 23 of the petition, record page 73.)

The petition set out and contended that the defendant could not end, terminate or surrender the franchise.

(See paragraph 25 of the petition, record page 73.)

(See also paragraph 26 of the petition, record page 73.)

The petition specifically alleged that the suit was based upon the rate contract in question.

(Paragraph 31 of the petition, record page 75.)

The petition alleged that operation of the street railway line in question must be maintained and continued without any interruption, under the contract of April 1, 1903.

(See paragraph 33 of the petition, record pages 75 and 76.)

Defendant in its answer specifically denied the 18th, 25th, 26th and 33rd paragraphs of the petition.

(See paragraph 2 of the answer, record page 79.)

Answering paragraph 23 of the petition it admitted that its Board of Directors had passed resolutions declaring the franchise ended, terminated and surrendered, and that the copies attached to the petition were correct.

(See paragraph 1 of the answer, record page 79.)

In answer to the 24th paragraph of the petition which alleged that the City of Decatur refused to accept the termination, ending and surrender of the franchise (record page 73) the defendant alleged that the surrender of the franchise was complete and effective without any action on the part of the Municipality; that defendant was no longer bound to operate thereunder.

(See paragraph 7 of the answer, record page 79.)

In answer to the 31st paragraph of the petition defendant denied the right of petitioner to bring the action referred to

in said paragraph and denied that plaintiff was entitled to any of the rights mentioned in said paragraph.

(See paragraph 9 of the answer, record page 80.)

The answer set out in detail the costs of continued operation of the line in question and showed that it actually costs 8.70 cents to haul a passenger who was only required to pay the sum of 5 cents. That the defendant should not be required to continue further operation under a contract, which had been ended, terminated, or surrendered; that compelled continued operation would unconstitutionally confiscate petitioner's property in violation of the 14th Amendment of the Constitution of the United States.

(See paragraph 16 of the answer, record pages 83-84; also paragraph 25 of the answer, record page 94.)

The answer specifically denying each and every one of the allegations thus made in the petition is sufficient, under the Georgia practice, and is not merely "a plea of the general issue" as argued in respondent's brief.

Georgia Code Section 5634, among other things, provides:

That a defendant "may in a single paragraph deny any or all of the allegations of the petition."

Such denial is sufficient.

Ocean Steamship Co. vs. Anderson, 112 Ga. 835 (1), 836.

DeSoto Plantation Company vs. Hammett, 111 Ga. 24.

Such a denial "places upon the plaintiff the burden of proving the allegations as made."

Supreme Lodge Knights of Pythias vs. Crenshaw, 129 Ga. 195 (3), 202 (3).

See also Georgia Code Section 5539.

The suggestions made in respondent's brief that the questions brought to this Court for review first originated in the petition for certiorari to this Court are without merit. We do not see that this question is at all material, but if it is, we ask the permission of this Court to file certified copies of

brief and reply brief filed by the Georgia Power Company in the Supreme Court of the State of Georgia.

* * * *

Our original brief (pages 5 and 6) answers the mere assertion of respondent that no Federal question is involved.

Respectfully submitted,

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